SUPREME COURT, U. S.

73-1112

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Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

TOM S. ACUNA, ET AL, Petitioner No. 259-80

ARTHUR C. ARCHIBALD, ET AL, Petitioner
No. 292-70

COURT P. ALLEN, ET AL, Petitioner
No. 349-70

CECIL B. BARNETT, ET AL, Petitioner
No. 454-70

RODNEY S. CRAFT, ET AL, Petitioner
No. 203-72

v.

UNITED STATES, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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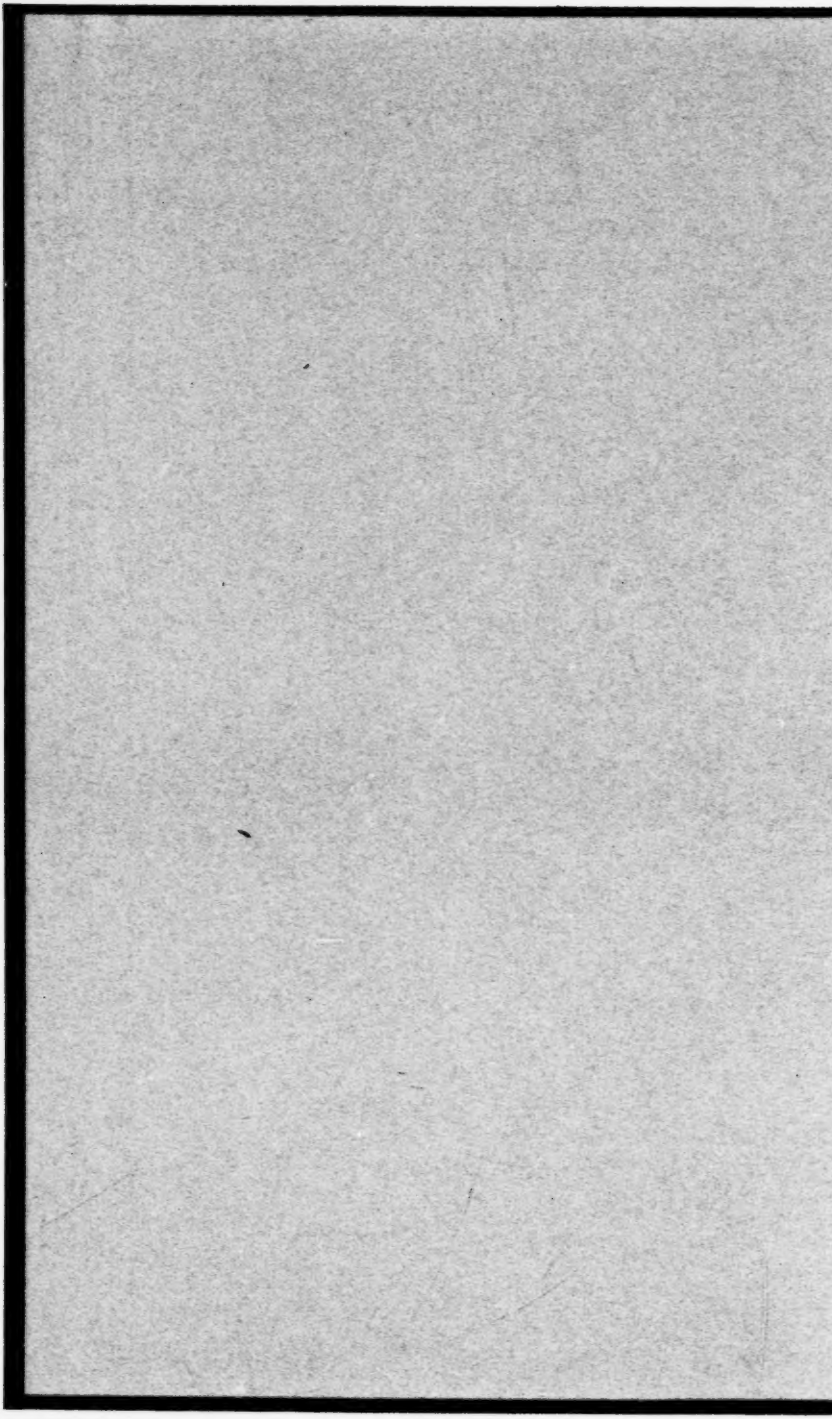

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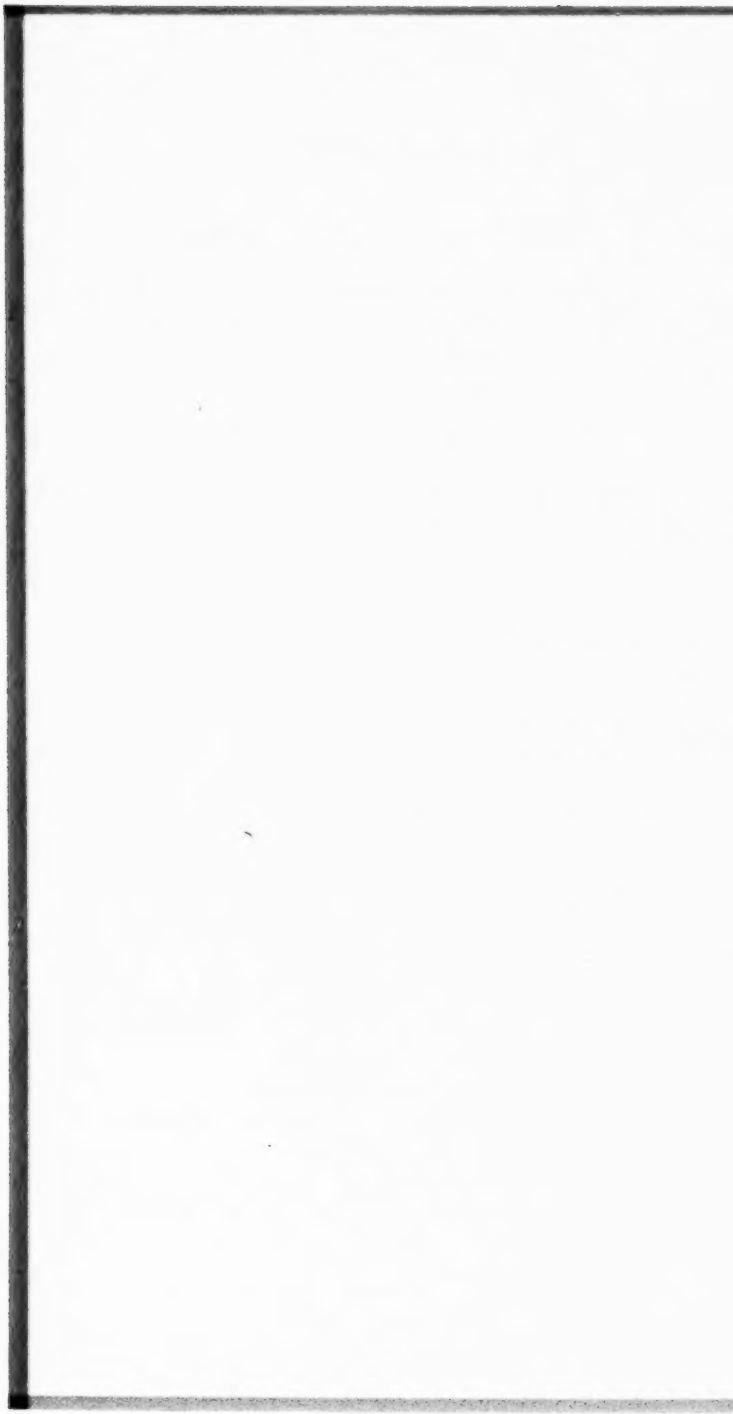

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on June 20, 1973.[1]

OPINION BELOW

The opinion of the Court of Claims is included in the Appendix to this Petition as Exhibit Number 1.

JURISDICTION

The Court's jurisdiction is invoked under Title 28, United States Code Section 1255(1). The judgment of the Court of Claims was entered on June 20, 1973. A petition for rehearing was denied on

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[1] Several petitioners desire not to participate further in this case and accordingly, this Petition for Certiorari is not made on behalf of the following: Philip J. Curran; Samuel P. Doran; I. Friedman; Chester Hunt; Dale L. Bertrand; Charles E. Duckworth; Thomas L. Thompson; Edwin L. Jones; Paul J. Nichols; Donald M. Taylor; Wilfred C. Viens; Kenneth Langford and William T. Carty.

October 17, 1973, and this Petition for Certiorari was filed within 90 days of that date.

QUESTIONS PRESENTED

1. Whether the United States Immigration and Naturalization Service has the discretion by the use of scheduling procedures to avoid payment of overtime compensation for hours worked in excess of forty hours within the administrative workweek.

STATUTORY PROVISIONS INVOLVED

1. Title 5, United States Code Section 5542 (referred to hereafter as 45 Act overtime); in part provides:

> (a) Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or ... in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:
>
> (1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times

> the hourly rate of basic pay of the employee, and all that amount is premium pay.
>
> (2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay....

2. Title 8, United States Code Section 1353a:

> The Attorney General shall fix a reasonable rate of extra compensation for overtime services of immigration officers and employees of the Immigration and Naturalization Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days'

pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Attorney General is vested with authority to regulate the hours of such employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for such employees for the overtime pay herein fixed.

3. Title 5 United States Code Section 5549:

This subchapter does not prevent payment for overtime services of for Sunday or holiday work under any of the following statutes -

(1) section 394 of title 7;
(2) sections 1353a and 1353b of title 8;
(3) sections 261, 267, 1450, 1451, 1451a, and 1452 of title 19;
(4) section 382b of title 46; and
(5) section 154(f) (3) of title 47.

However, an employee may not receive premium pay under this subchapter for the same services for which he is paid under one of these statutes.

4. Title 5, United States Code Section 6101 provides in part:

(2)...The head of each Executive agency, military department, and of the government of the District of Columbia shall-

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) Except when the head of an Executive agency, a military department, or the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that -

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40 hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

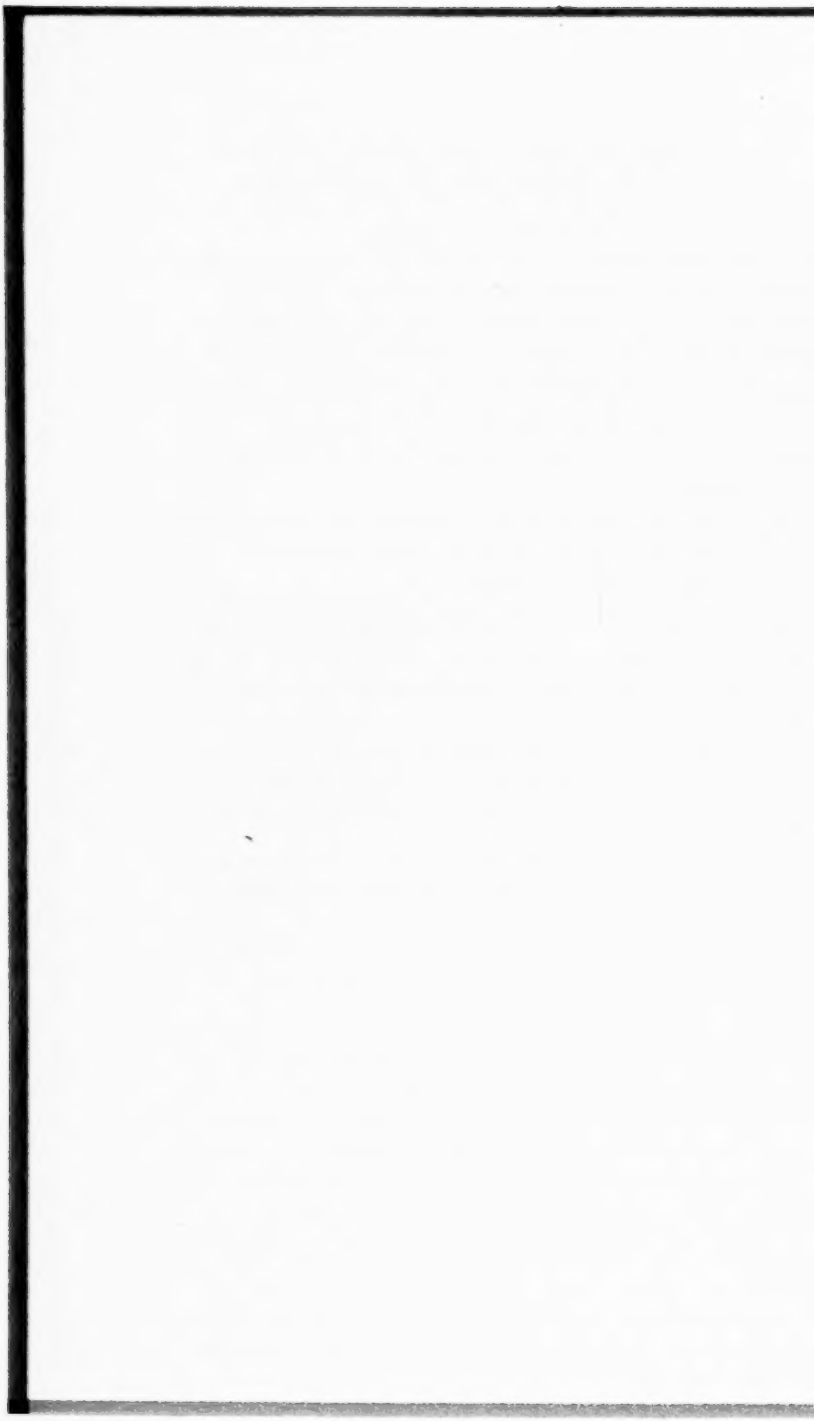
(C) the working hours in each day in the basic workweek are the same;

(D) the basic nonovertime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

(4) Notwithstanding paragraph (3) of this subsection, the head of an Executive agency, a military department, or of the government of the District of Columbia may not establish special tours of duty, of not less than 40 hours, to enable employees to take courses in nearby colleges, universities, or other education institutions that will equip them for more effective work in the agency. Premium pay may not be paid to an employee solely because his special tour of duty estab-



lished under this paragraph results in his working on a day or at a time of day for which premium pay is otherwise authorized....

5. Title 5, United States Code Section 5546:

(a) An employee who performs work during a regularly scheduled 8 hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay.
(b) An employee who performs work on a holiday designated by Federal statute, Executive order, or with respect to an employee of the government of the District of Columbia, by order of the Board of Commissioners of the District of Columbia, is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not -
(1) in excess of 8 hours; or
(2) overtime work as defined by section 5542(a) of this title.
(c) An employee who is required to perform any work on a designated holiday is entitled to pay for at least 2 hours of holiday work.
(d) An employee who performs overtime work as defined by section 5442(a)[1] of this title on a Sunday or a designated holiday is entitled to pay for the overtime work in accordance with section 5542(a) of this title.

(e) Premium pay under this section is in addition to premium pay which may be due for the same work under Section 5545(a) and (b) of this title, providing permium pay for nightwork.

STATEMENT OF CASE

The jurisdication of the United States Court of Claims was invoked under Title 28 United States Code Sections 1491 and 2501.

The Immigration and Naturalization Service of the Department of Justice of the United States (referred to hereafter as the "Agency") because of the nature of its duties, functions seven days a week, twenty-four hours a day.

The Agency has facilities operative seven days a week, twenty-four hours a day, some of its employees are regularly scheduled to work on Sundays.

The Agency has established, by regulation, an administrative workweek of seven consecutive days, beginning 12:01 a.m. Sunday, and ending midnight Saturday.

Of those employees that are regularly

scheduled to work on Sundays, there are two general classes:

CLASS ONE:

The Petitioners: Employees, working at various points of entry into the United States involved in the inspection of persons entering the United States. Petitioners are regularly scheduled, in advance, to work six days a week. One of the six days is always Sunday. Petitioners fall within the provisions of Title 8 United States Code Section 1353a (hereafter referred to as the '31 Act).

CLASS TWO:

Every other employee regularly scheduled to work, in advance, who's duties do not qualify such employee to extra compensation under the '31 Act.

Under Agency practice, the "basic workweek" (the time reference used to determine when overtime starts, i.e. work in excess of 40 hours under the Federal Pay Act of 1945, 5 USC §§ 5542) for the petit-

ioners does not begin on the first day regularly scheduled to work within the administrative workweek, namely Sunday, but rather commences on the next consecutive day such employee is scheduled to work within such administrative workweek.

The other class of employee, on the other hand, who is regularly scheduled to work on Sunday, begins his basic workweek on Sunday (the first day regularly scheduled to work in such administrative workweek (See Appendix, Exhibit 2).

By maintaining this double standard of scheduling, the Agency has frustrated the payment of overtime under Title 5, United States Code Section 5542a, as to both classes of employees in the following manner.

CLASS ONE: The petitioners are all required to work six days a week, and all work on Sundays! The Agency, by deciding that the second day that they are regularly scheduled to work in advance within the

administrative workweek, commences their basic workweek, creates a situation where the first day worked, Sunday is ignored altogether and the next consecutive Sunday which falls within the next administrative workweek is counted as part of the previous workweek so that it becomes work in excess of 40 hours because it is now considered the sixth workday instead of the first. Thus, Sunday by this scheduling devise now is both '31 Act and '45 Act overtime.

The agency now contends that since Sunday is both '31 Act and '45 Act overtime, a pyramiding situation exists and only the '31 Act applies because it provides greater compensation. It is the petitioner's position that the sixth day of the workweek is either Friday or Saturday for which they have received no compensation whatever.

The Agency has been paying Class One employees as follows:

Two days pay for Sunday ('31 Act Com-

pensation). One days' pay for each of the next five days they work (the basic workweek) within the administrative workweek, for a total of seven days pay.

Petitioner's contend that proper statutory application requires they be paid as follows:

Three days' pay for Sunday (2 days for '31 Act compensation plus one day toward their basic workweek), one days' pay each for the next four days of their basic and one and one half days pay for overtime under the '45 Act for the sixth day worked which is either Friday or Saturday, for a total of eight and one half days' pay.

The Agency claims authority to engage in these questionable scheduling practices on two grounds;

First, Title 5, United States Code Section 6101; and

Second, prior long standing administrative scheduling practices.

Section 6101 established a preference for a basic workweek on Monday through Friday, with two consecutive days off. It further provided for a variance from this rigid Monday through Friday scheduling, if the agency involved could meet a stringent test requiring a showing of substantial and serious economic adversity or inability to perform the agency's duties.

The Agency sought to legitemize its scheduling practices, by petitioning to and receiving from the United States' Attorney General authority to vary its scheduling (Appendix Exhibit 3).

The Agency contends that it was given discretion by the Attorney General not merely to vary its scheduling as to Monday through Friday basic workweeks (which is all the grant provides in essence) but to regularly schedule employees to work six days a week which always includes Sunday,

and then officially commence the basic workweek on Monday because the Agency felt two days pay under the '31 Act was enough for anyone that had to work Sunday.

REASONS FOR GRANTING THE WRIT

The Writ should be granted as the record here offers a clear and vital opportunity for this Court to relieve the petitioner of the discriminatory, oppressive, and deceptive scheduling practices imposed by the Agency, and effect a return to an implementation of the appropriate statutory provisions that is compatable with and conforms to the intent expressed by the drafting legislature.

> To make the administrator all powerful would create an intolerable situation. For power is a heady thing; and even the best of men get delusions of omnipotence (Douglas, We, the Judges, p. 179).

The Agency, with the stamp of approval of the Court of Claims, has even discounted the Bible :

> And God blessed the seventh day, and sanctified it: because that in it he had rested from all his work which God created and made. (Genesis 2:1, 3).

Eight days are necessary to accommodate the Agency's workweek because under the Agency's theory you don't count the first Sunday, but you count the second Sunday in the second administrative workweek as part of the first administrative workweek so that the second Sunday will be work in excess of 40 hours within a week which the second Sunday is not a part thereof.

By this complex and contorted fiction, the Agency contends that the sixth consecutive workday is within the seven day administrative workweek, so that the sixth day is '45 Act overtime and '31 Act extra compensation. Hence, the Agency's contention of pyramiding, when in reality the sixth day of the schedule is in fact Friday or Saturday, as the case might be, instead of the second Sunday which as anyone can

count on their fingers is eight.

Petitioners have placed before the United States' Court of Claims, and now the Supreme Court, an issue of tremendous magnitude. The issue was created by a conflict which has arisen between the proper application of statutory authority and the scheduling activities of the Agency. It was born of an attempt to set aside a class of employees recognized as unique by legislation, and then utilize this uniqueness as a basis to frustrate that same legislation.

I. THE AGENCY'S SCHEDULING OF PETITIONER'S BASIC WORKWEEK FOR THE EXPRESS PURPOSE OF AVOIDING THE OVERTIME PAY PROVISIONS OF THE FEDERAL EMPLOYEES' PAY ACT OF 1945, EXCEEDS PROPER DISCRETION AUTHORITY, IS ARBITRARY IN NATURE, AND IS DISCRIMINATORY AND OPPRESSIVE IN ITS EFFECT.

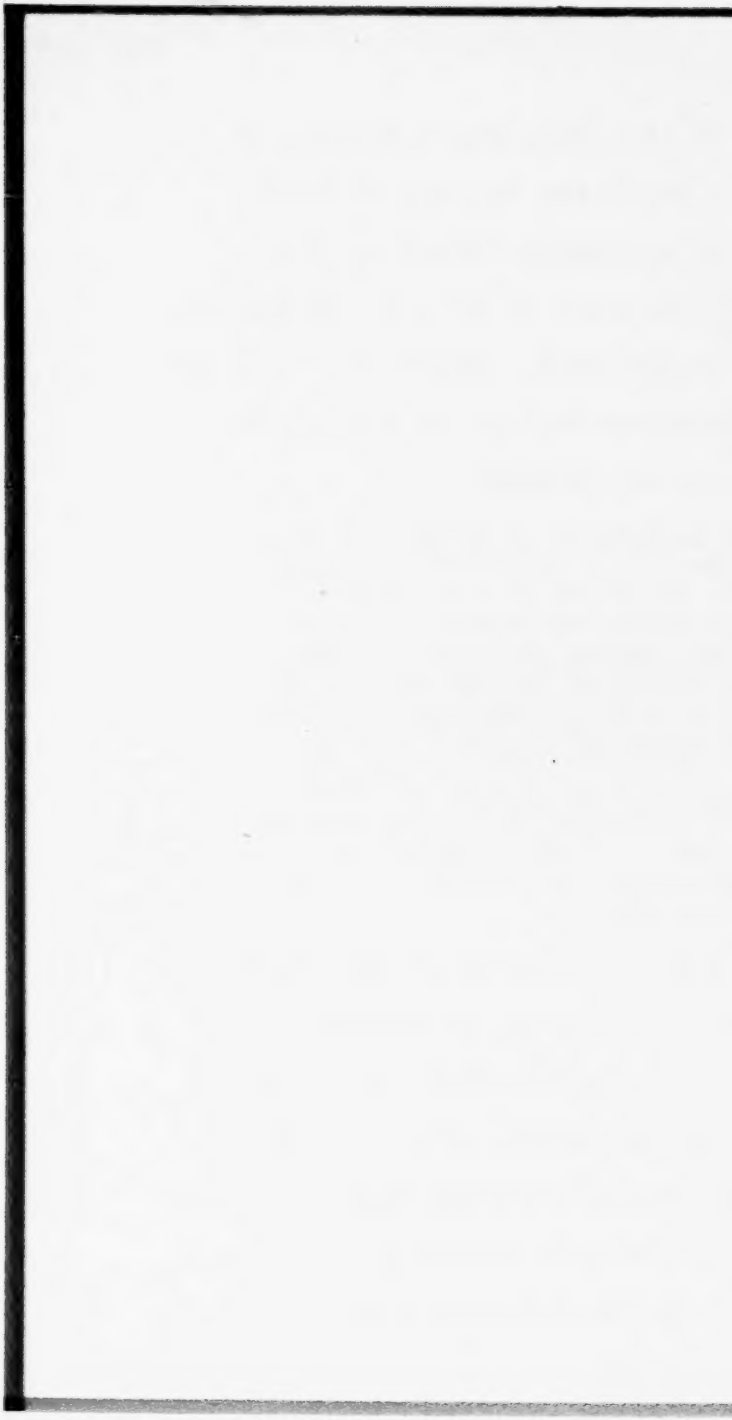
The Agency has twisted and expanded a limited grant of discretion from the United States Attorney General to a scope which exceeds fairness, logic, equity, and statutory interpretation.

A study of the legislative history of the Federal Employees Pay Act of 1945 indicates an expressed intent by the drafting legislators as to the composition of the basic workweek. Report No. 726, of the 79th Congress states, in regard to the 1945 Act, as follows:

> It is desirable to establish by legislation a definite, uniform number of hours as the length of the basic workweek, because (a) The number of hours in the basis workweek is the number of hours a week an employee is regularly expected to work and to earn his basic rate of pay, and (b) service in excess of that number of hours is identified as overtime, for which additional compensation is payable. (p. 6, emphasis added)

The legislators further recognized that compensation rates must be substantial if highly qualified applicants are to be attracted to government service, and that the gap between private and public salaries should be diminished (supra, p. 4).

How could it be said more clearly!



The Agency received a purported grant of discretion from the United States Attorney General to vary its scheduling of the basic workweek Monday through Friday. This telegram did not give the Agency any cause to avoid the payment of overtime for work completed within the week in excess of forty hours. Yet, that is exactly how the Agency has treated this grant.

Why else would the Agency require a practice in which the original schedules showed no one working, while the copies posted on the boards for the employees to follow did? (Appendix Exhibit 5).

When the Agency designated the administrative workweek as Sunday through Saturday, and uniformly scheduled Sunday as a workday, the hours thus worked are hours which the employee is "regularly expected to work" and should be part of such employee's basic workweek like every other Federal employee. This is the proper and

uniform application of the statute.

Where does the law give the Agency the right to do otherwise?

The memorandum originating from then Assistant Regional Commissioner E. W. Myers (Appendix, Exhibit 4) reveals the true motivation that has prompted the Agency's behavior - a blatant attempt to obscure the scheduling practices by not scheduling a day that is regularly scheduled and worked.

Even Mr. Myers recognized the obvious and logical implication to be drawn from this deception.

The Agency has <u>never</u> produced any statute, case, or rule of reason, which gives it the power to treat petitioners in such an illogical and inconsistent manner. The Agency argues that this practice has been going on a long time so this duration must therefore, make this scheduling practice legitimate.

Considering the nature of what is attempted to be legitimized here, the deprivation of earned compensation through the use of artifice and twisted logic, one can only be reminded of the arguments of tradition and time raised by the supporters of child labor which was steeped with hundreds of years of practice.

The use of these discriminatory and unfair scheduling practices accomplishes a minimization of the Agency's financial responsibility at the cost of the petitioners who are all ordered to forsake their day of rest and reverence.

As Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, pointed out, the crucial question in equal protection cases is whether there is an appropriate governmental purpose suitably furthered by the differential treatment.

The purpose achieved by the Agency to date is the avoidance of payment of earned

'45 Act overtime.

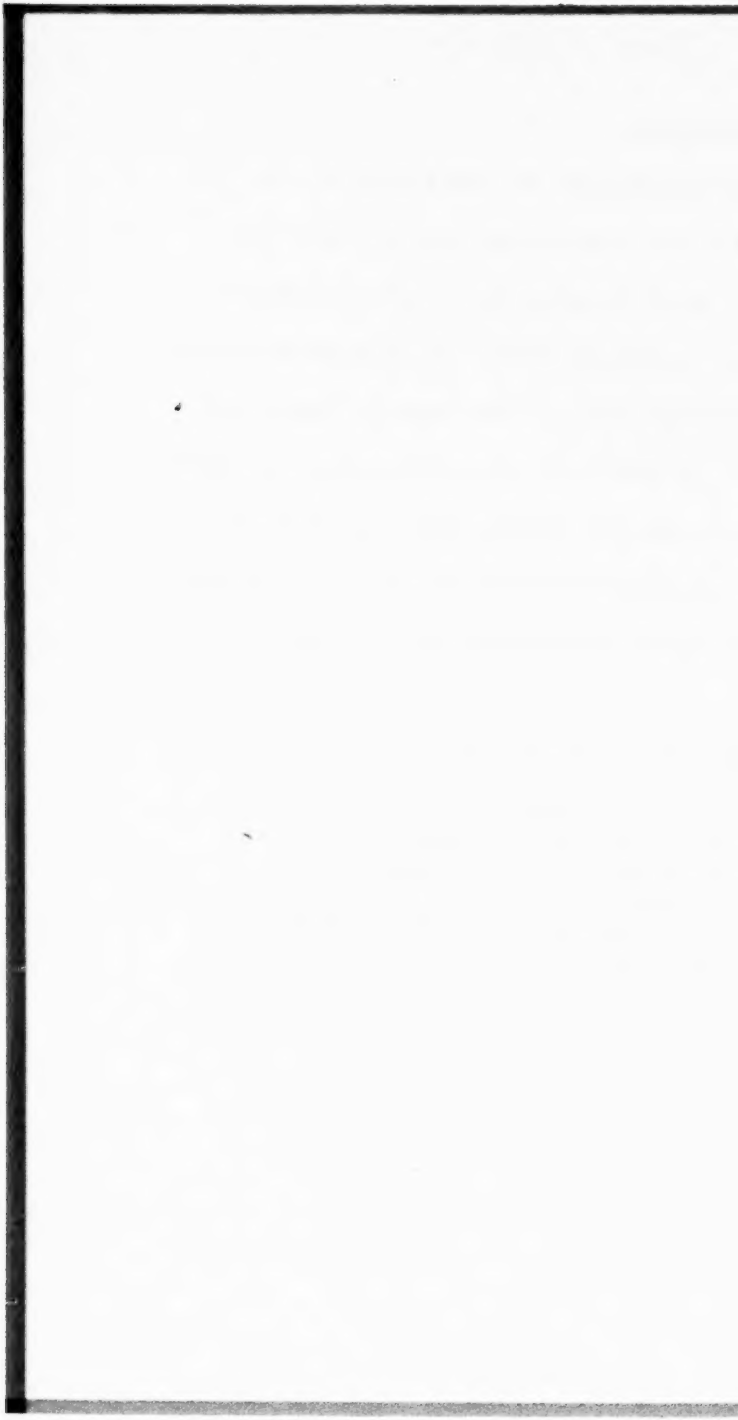
The classification of employee's who perform '31 Act services, when they are ordered to work Sunday is tied inextricably to the purpose that the classification seeks to accomplish. The Agency must not be allowed to pervert Congressional intent to its own ends by using the '31 Act as a basis for classification which is intended to deprive such employees of '45 Act overtime.

II. THE APPLICATION OF ADMINISTRATIVE DISCRETION AS A MEANS TO AVOID FISCAL RESPONSIBILITY CONSTITUTES A DEPRIVATION OF EARNED COMPENSATION WITHOUT DUE PROCESS OF LAW AND ADDS THE RULE OF LEGISLATOR TO ITS ALREADY AWESOME ADMINISTRATIVE POWERS.

Thomas Jefferson, on the occasion of his first inaugural address noted:

> A wise and frugal government shall not take from the mouth of labor the bread it has earned.

The Court in U. S. Cx. Rel. Montgomery v. Ragen, D.C. Ill., 86 F. Supp. 382, 388,



stated:

> Due process of law is that process of impartial law which is binding because it is right. It senses the mistakes of the past and wants to rectify them. It provides men with faith.

Viewed in the pure, unforgiving verities of this philosophy of fairness and equity, the Agency's shocking self-assumption of legislative power seems inappropriate and irresponsible. The Agency has taken upon itself to place its interpretation of statutory authority above that which was expressed by the framers of the legislation, and in doing so has elevated itself above the democratic processes which are fundamental for the survival of this country.

If a statute is subject to two interpretations, a situation which petitioner urges is not to be found here, it is proper to weigh the injustice which may result from one of the interpretations.

Indeed, it is the duty of the courts to

apply such an interpretation as will best serve the interests of justice (50 Am.Jur. § 370 p. 376).

As the United States Court of Claims observed in Renner and Krupp v. U. S., 106 ct Cls. 676 (1946):

> It is primary that practice and regulations must conform to the statute, must in fact be in aid of the statute which is sought to be administered. (Supra p. 684; emphasis added).

As in Renner, where the Court found the administrative practice violative of the statutory terms, we have here an administrative agency forcing its own selfish interpretation upon statutes to subjugate their plain legislative intent. This kind of practice, as Renner observes, is worse than administrative legislation, it is destructive of congressional legislation.

Due process, as the Court in ex rel. Montgomery, Supra, recognized, senses the mistakes of the past and wants to rectify

them. The Agency has taken a mistaken interpretation and seeks to legitimize it with the length of its spurious application. This is not compatible with the spirit of due process.

CONCLUSION

Petitioners work a long and brutal schedule, often at the sacrifice of their private lives, and in remote locales. The Agency seeks to deprive them of compensation to which they are entitled by manipulative scheduling.

The United States Supreme Court has yet to rule regarding the proper interpretation and implementation of the Federal Employees Pay Act of 1945. This Act is too vast in its implications and scope to be left to the interpretive designs of a Federal Agency which has so profoundly demonstrated a callous attitude towards its employees. This case offers a sterling opportunity for the Court to exercise its jurisdiction and

thus stabilize a situation which is allowing a thwarting of legislative intent.

> Some words of a statute may be words of art, having definite meaning. Others may take their meaning from their setting in a statute and be defined only in light of the purpose of the legislature and the objective sought to be reached.
>
> While the courts have the final say in construing the words of a statute, the choice of the myriad situation to which it should apply often turns on specialized knowledge of the agency. The court has therefore given the agency's determination special weight. But with due allowance, to the expertise and wide discretion of the agency, the Court has the final say whether the application of an Act is proper. (Douglas, We, the Judges p. 179)

Petitioners ask this Court to rectify the injustice perpetrated on petitioners by the Immigration and Naturalization Service, and pay them the overtime for

.....

.....

.....

the sixth day each week that they have been ordered to work.

Respectfully submitted,

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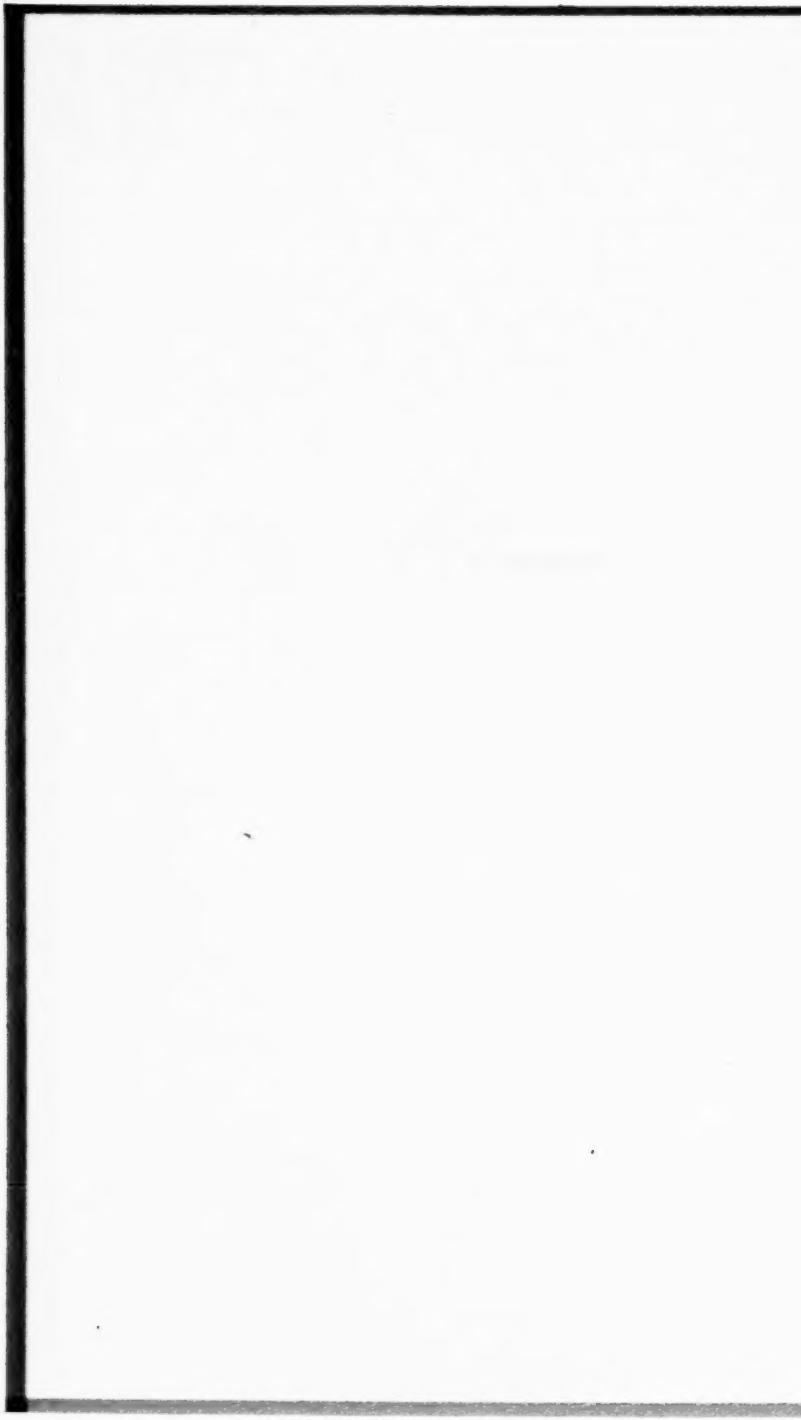
January 14, 1974

APPENDIX



PETITIONER'S EXHIBIT 1

OPINION OF THE UNITED STATES COURT OF CLAIMS

In the United States Court of Claims

(Decided June 20, 1973)

No. 259–70

TOM S. ACUNA, ET AL. v. THE UNITED STATES

No. 292–70

ARTHUR C. ARCHIBALD, ET AL. v. THE UNITED STATES

No. 349–70

COURT P. ALLEN, ET AL. v. THE UNITED STATES

No. 458–70

CECIL B. BARNETT, ET AL. v. THE UNITED STATES

Robert C. Baxley, attorney of record for plaintiffs. *Jones, Baxley, Crouch and McCarty*, *John S. Rhoades*, and *Holt, Rhoades & Hollywood*, of counsel.

Thomas E. Thomason, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

The 336 plaintiffs in these four cases are suing to recover compensation for work performed by them as immigration inspectors for the Immigration and Naturalization Service, United States Department of Justice (hereinafter sometimes

referred to as the Service), at several different ports in three of the Service's four regions.[1] Plaintiffs regularly work six days a week and receive the equivalent of seven days' pay. They claim, however, that they are entitled by law to receive the equivalent of eight and one-half days' pay. The case is before the court on cross-motions for summary judgment.

In order to earn their annual salary, immigration inspectors are required to work a 40-hour week, normally comprised of five days, eight hours a day. The existing Immigration and Naturalization Regulations[2] state that the eight hours a day shall be performed between Monday and Saturday. In addition to the regularly scheduled 40-hour week, all immigration inspectors have been regularly required to perform inspectional duties for eight hours on Sunday in connection with the examination of persons entering the United States.[3] In effect, therefore, immigration inspectors are required to be on duty forty-eight hours a week, consisting of eight hours a day, six days a week, and one of those six days is always Sunday.

Since 1931, plaintiffs have received preferential pay treatment with respect to other Federal workers in the form of "extra compensation" for overtime, Sunday, and holiday work. The Act of March 2, 1931 grants immigration inspectors two days' extra compensation for Sunday and holiday duty.[4] Subsequently, the Federal Employees Pay Act of

---

[1] On March 1, 1971, this court ordered that these four petitions be consolidated pursuant to Rule 131(a).

[2] Immigration & Naturalization Service Administrative Manual 2818.04, section 1c, dated May 15, 1962.

[3] For purposes of its motion, defendant has admitted that plaintiffs regularly worked eight hours on Sundays during the claim periods and that this work was officially ordered or approved within the contemplation of agency regulations implementing the Federal Employees Pay Act of 1945, *as amended*, 5 U.S.C. § 5542(a) (1970).

[4] 46 Stat. 1467, *as amended*, 8 U.S.C. § 1353a (1970), reads as follows:

"§ 1353a. Officers and employees; overtime services; extra compensation; length of working day.

The Attorney General shall fix a reasonable rate of extra compensation for overtime services of immigration officers and employees of the Immigration and Naturalization Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half

1945 was passed which provides generally that government employees' working hours officially ordered or approved in excess of 40 hours in an administrative workweek, or in excess of eight hours in a day, are overtime and shall be paid for at a premium rate of one and one-half times the basic hourly rate.[5] This latter act, however, contains an anti-pyramiding provision,[6] the effect of which is to prevent an employee from receiving premium pay under the 1945 Pay Act for the same services for which he is paid under another listed statute. Listed therein are "sections 1353(a) and 1353(b) of title 8," the Act of March 2, 1931.

The Immigration and Naturalization Service has designated the seven consecutive days beginning Sunday at

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day's pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Attorney General is vested with authority to regulate the hours of such employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for such employees or the overtime pay herein fixed."

[5] 5 U.S.C. § 5542 (1970), reads in pertinent part as follows:

"§ 5542. Overtime rates; computation.

(a) Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS–10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of eight hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS–10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS–10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS–10, and all that amount is premium pay."

* * * * *

[6] 59 Stat. 302, *as amended*, 5 U.S.C. § 5549 (1970) provides as follows:

"§ 5549. Effect on other statutes.

This subchapter does not prevent payment for overtime services or for Sunday or holiday work under any of the following statutes—

(1) section 394 of title 7;

(2) sections 1353a and 1353b of title 8;

(3) sections 261, 267, 1450, 1451, 1451a, and 1452 of title 19;

(4) section 382b of title 46; and

(5) section 154(f)(3) of title 47.

However, an employee may not receive premium pay under this subchapter for the same services for which he is paid under one of these statutes."

12:01 a.m. and running through Saturday, midnight, as the administrative workweek. Further, they have designated Monday through Saturday as the basic workweek for immigration inspectors. The placing of Sunday outside the basic five-day 40 hour workweek and making it the sixth work day of the administrative workweek by the Service had the effect of preventing the immigration inspectors from receiving one and one-half days' of premium pay under the 1945 Federal Employees Pay Act for the sixth day worked since they already receive two additional days' pay for Sunday duty under the Act of March 2, 1931, for the same services. Plaintiffs work six days per week and receive the equivalent of seven days' pay. Their basic workweek runs from Monday through Saturday, during which period they work five days and get one day off. It is within the basic workweek that they must work their 40 hour week as a credit towards their annual salary. Thus, during the basic workweek plaintiffs work five days out of six and receive five days' pay. In addition, they are required to work on Sunday, which, under the present arrangement, is outside the basic workweek. Since Sunday is outside the basic workweek, Sunday work is not counted towards earning their annual salary. Plaintiffs do receive two additional days' pay as extra compensation under the Act of March 2, 1931 for work performed on Sunday. They do not receive one and one-half days of premium pay under the 1945 Federal Employees Pay Act for "eight hours of work officially ordered or approved in excess of 40 hours in an administrative workweek" because those eight excess hours of work are considered to have been performed on Sunday (as a result of the manner in which the Service has scheduled the administrative workweek and the basic workweek) and the anti-pyramiding provision of the Federal Employees Pay Act of 1945 does not permit an employee to receive premium pay under that Act for the same services for which he is paid under the Act of March 2, 1931.

The issue presented for decision in this case is whether the Immigration and Naturalization Service abused its discretion by scheduling Sunday outside of the basic workweek, where the administrative workweek commenced on Sunday, and plaintiffs were regularly and consistently required to work

on Sundays, and the effect of such scheduling was to deny to plaintiffs premium pay under the Federal Employees Pay Act of 1945.

Plaintiffs contend that the basic workweek should begin on Sunday, the same day on which the administrative workweek begins, and that the Service's failure to so schedule the basic workweek is an abuse of discretion and an unreasonable interpretation of the relevant statutes. The effect of having the basic workweek commence on Sunday, as plaintiffs urge, is that the immigration inspectors would work a 40-hour period between Sunday and Friday, having one full day off, and then work overtime on Saturday. According to plaintiffs' theory, they should receive three days' pay for Sunday (one day's pay as a part of the basic workweek and two additional days' pay under the Act of March 2, 1931, for Sunday work) and one and one-half days' pay for Saturday (time and a half for overtime work in excess of 40 hours a week). In other words, plaintiffs claim that they are entitled to receive the equivalent of eight and one-half days' pay for six days of work.

Defendant's position is that the Service was given discretion to consider its costs and proper functioning in scheduling the basic workweek and that it has properly exercised its discretion by scheduling a basic workweek of five days during Monday through Saturday. We agree with the defendant and hold that there was no abuse of discretion on the part of the Service for all of the reasons set out below.

The Federal Employees Pay Act of 1945, 59 Stat. 303, *as amended* by the "Fringe Benefits Bill," 68 Stat. 1112, signed into law on September 1, 1954, subsequently amended and now codified as 5 U.S.C. § 6101(a) (1970), provides in pertinent part:

> § 6101. Basic 40-hour workweek; work schedules; regulations.
>
> (a)(1) * * *
>
> (2) The head of each Executive agency, military department, and of the government of the District of Columbia shall—
>
> (A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and
>
> (B) require that the hours of work within that

workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) *Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased,* he shall provide, with respect to each employee in his organization, that—

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

(C) the working hours in each day in the basic workweek are the same;

(D) the basic nonovertime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday. [Emphasis supplied.]

* * * * *

The requirements contained in section 6101(a)(2)(A) and (B), that the head of the agency establish a basic workweek of 40 hours for each full-time employee and require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days, are mandatory, as indicated by the use of the word "shall." Moreover, the basic workweek established by the Service in this case clearly met these mandatory requirements. On the other hand, the several provisions contained in section 6101(a)(3), including the provision that the basic 40-hour workweek be scheduled on 5 days, Monday through Friday when possible, and that the 2 days outside the basic workweek be consecutive,[7] are subject to the discretion of the agency head. The above-cited statutory language makes it abundantly clear that in scheduling the basic 40-hour workweek the head of an Executive agency was given discretion

[7] Plaintiffs do not make any claim based on the scheduling of a basic workweek over six days, rather than five.

to vary from the usual Monday through Friday workweek, etc., where he determined that the functions of the agency would be impeded or where the costs would be substantially increased as a result of following the various prescriptions of section 6101(a)(3). By providing for such discretion, Congress recognized that the proper functioning of certain agencies would require more latitude in the scheduling of basic workweeks.

5 U.S.C. § 6101(c) (1970) provides:

> (c) The Civil Service Commission may prescribe regulations, subject to the approval of the President, necessary for the administration of this section insofar as this section affects employees in or under an Executive agency.

The implementing regulations promulgated by the Civil Service Commission do not require that the agency follow guidelines other than those set forth in section 6101(a) (2) and (3). Concerning the establishment of a basic workweek, 5 C.F.R. § 610.102(c) (1970), "Definitions," reads:

> (c) "Basic workweek," for full-time employees, means the 40-hour workweek established in accordance with § 610.111.

5 C.F.R. § 610.111(a) (1970), "Establishment of Workweeks," then provides in part:

> (a) The head of each agency, with respect to each group of full-time employees to whom this subpart applies, shall establish by regulation:
>
> (1) A basic workweek of 40 hours which does not extend over more than 6 of any 7 consecutive days. Except as provided in paragraphs (b) and (c) of this section, the regulation shall specify the calendar days constituting the basic workweek and the number of hours of employment for each calendar day included within the basic workweek.
>
> * * * * *

In accordance with these directives and under the delegation of authority from the Attorney General, 28 C.F.R. § 0.144 (1970), the Commissioner of Immigration and Naturalization has by Immigration and Naturalization Service Administrative Manual (I & N Service AM) at 2818.03

(May 15, 1962) established a basic workweek as follows:

Definitions:

* * * * *

The term "basic workweek" for full-time officers and employees means the 40-hour workweek which shall not extend over more than six of the seven days in the administrative workweek.

The I & N Service AM. at 2818.04, further provides:

Section 1c, Schedyling the Basic Workweek: Daily tours of duty in the basic workweek shall be established within a maximum of 9 continuous clock hours, with 1 hour for food and rest. Normally, each tour will consist of 8 hours of duty over a period of 8 hours and 30 minutes. The basic workweek for immigration officers performing inspection duties shall be established on weekdays, Monday through Saturday, *including holidays occurring on those days*, but excluding Sunday. When it is impracticable to prepare work schedules in advance for periods of not less than two weeks that coincide with pay periods, as provided in AM 2961, such work schedules for the basic workweek must be prepared and posted not later than the close of business on the Friday preceding the week for which the work schedules apply. [Emphasis in original.]

With respect to the establishment of an administrative workweek, 5 C.F.R. § 610.102(a) and (b) (1970) state:

(a) "Administrative workweek" means a period of 7 consecutive calendar days designated in advance by the head of an agency under section 6101 of title 5, United States Code.

(b) "Regularly scheduled administrative workweek," for full-time employees, means the period within an administrative workweek, established in accordance with § 610.111, within which these employees are required to be on duty regularly. For part-time employees, it means the officially prescribed days and hours within an administrative workweek during which these employees are required to be on duty regularly.

5 C.F.R. § 610.111(a)(2) (1970) provides further that the head of each agency shall establish:

(2) A regularly scheduled administrative workweek which consists of the 40-hour basic workweek established in accordance with subparagraph (1) of this

> paragraph, plus the period of overtime work, if any, regularly required of each group of employees. Except as provided in paragraphs (b) and (c) of this section, the regulation, for purposes of leave and overtime pay administration, shall specify by calendar days and number of hours a day the periods included in the regularly scheduled administrative workweek which do not constitute a part of the basic workweek.

Consistent with these Civil Service Commission regulations, the Immigration and Naturalization Service in I & N Service AM at 2818.03 (May 5, 1962) has defined these terms as follows:

> The term "administrative workweek" means the seven consecutive days from 12:01 a.m. Sunday to midnight Saturday.
>
> * * * * *
>
> The term "regularly scheduled administrative workweek" for full-time officers and employees means the period within an administrative workweek when such officers and employees are required to be on duty regularly.

The statute and implementing regulations thus describe an gency's discretion to designate a seven-day administrative orkweek, and, within such administrative workweek, a five-lay period known as a basic workweek. Further, the regularly cheduled administrative workweek includes the 40-hour asic workweek, plus regularly scheduled overtime. While a reference is expressed for a basic workweek running from Ionday through Friday, and for the two days outside the asic workweek to be consecutive, the head of an agency is iven discretion to deviate from this preferred pattern where e "determines that the agency would be seriously handi-apped in carrying out its functions or that costs would be ubstantially increased." Since it is quite apparent that the ervice was given discretion to consider agency functions nd costs in scheduling the basic workweek, we must now onsider whether it properly exercised that discretion.

In a memorandum dated November 2, 1954, the Commis-oner of Immigration and Naturalization stated to the At-orney General of the United States (the head of the agency)

that broad application of certain provisions of the September 1, 1954, amendment to the Federal Employees Pay Act of 1945 (including the provision that the basic 40-hour workweek be scheduled on 5 days and that the 2 days outside the basic workweek be consecutive) "would not only substantially increase costs, but might well cripple the Service." The memorandum requested that the Service be permitted to schedule and operate on hours of duty which deviated from those set forth in the 1954 amendment. In support of his request, the Commissioner attached to his memorandum a justification for exceptions from the provisions of the amendment. This justification contained an exhaustive discussion of the nature of work performed by immigrant inspectors and the inherent administrative difficulties in scheduling their hours of duty. The Attorney General granted the Commissioner's request that Immigration and Naturalization employees be excepted from these provisions of the amendment to the Pay Act where operations would suffer or costs would be increased, and the District Directors of the Immigration and Naturalization Service were so notified on November 12, 1954.

It is therefore clear that the Service, after carefully considering the mandate of the 1954 amendment and the discretionary exception therein contained, determined that an exception from the normal scheduling was justified, in view of agency functions and the costs involved.

Plaintiffs apparently do not deny that the Service had discretion to schedule the basic workweek in a manner different from that prescribed in the 1954 amendment to the Federal Employees Pay Act of 1945. Rather, plaintiffs complain that it was an abuse of discretion to schedule a basic workweek the beginning of which does not coincide with the beginning of the administrative workweek, since the effect of such scheduling denies them premium pay for regularly scheduled overtime work under the Federal Employees Pay Act of 1945.

Neither 5 U.S.C. § 6101(a) nor the Civil Service Commission's implementing regulations contain any suggestion that the first day of the administrative workweek on which employees regularly work must be the first day of the basic

workweek. On the contrary, 5 C.F.R. § 610.111(b) (1970) strongly implies that this is not required. It states:

> (b) When it is impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled administrative workweek, the head of an agency may establish the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek as the basic workweek, and additional hours of officially ordered or approved duty within the administrative workweek are overtime work.

The obvious implication to be drawn from permitting the first 40 hours of duty performed within the administrative workweek to be considered the basic workweek in a situation where it is impracticable to prescribe a regular schedule of duty, is that where a regular schedule of duty can be prescribed, as in the instant case, the basic workweek need not be the first 40 hours of duty performed. 5 C.F.R. § 610.111(a)(2) (1970), set out in full earlier in this opinion, merely states that the regulations established by the agency head, "for purposes of leave and overtime pay administration, shall specify by calendar days and number of hours a day the periods included in the regularly scheduled administrative workweek which do not constitute a part of the basic workweek." There is no requirement in the Civil Service Commission's regulation that work regularly scheduled beyond 40-hour basic workweek be scheduled at the end of the administrative workweek, after the basic workweek has been completed. The requirement is simply that, once the agency has selected such period, its regulations specify the period by calendar day, etc., regardless of where in the administrative workweek it occurs. This is entirely consistent with the statute, wherein, as mentioned earlier, the only requirement not subject to agency discretion is that the agency head establish a basic workweek of 40 hours for each full-time employee and require that the hours of work within that workweek be performed within a period of not more than six of any seven consecutive days. Since the Service has established a basic 40-hour workweek over a period of six consecutive days, Monday through Saturday, and since its regulations clearly specify that Sunday is excluded from the

basic workweek, the requirements of the statute and of the Civil Service Commission's implementing regulations have been met.

Moreover, there is no logical reason why an employee's basic workweek should necessarily commence on the first day of the administrative workweek that he is scheduled to work. Both the scheduling actually used by the Service and that proposed by the plaintiffs seem equally appealing from a purely logical point of view.

What plaintiffs are really arguing in this suit, when their argument is distilled to its purest form, is that the failure of the Service to schedule the basic workweek for immigration inspectors in a manner that would maximize all possible benefits under the pay statutes herein involved amounts to an abuse of discretion.

This argument contradicts the plain meaning of section 6101(a) which permits the head of an agency to consider costs in scheduling work. If Congress had intended a result like that which plaintiffs are urging herein, it would obviously not have given such discretion to the agencies. Nor would it have included the anti-pyramiding provision in section 5549. The manifest intent of Congress in passing section 5549 was to preserve overtime benefits already possessed by groups like the immigration inspectors while preventing them from being paid under two different overtime statutes for the same services. With that congressional purpose clearly in mind, it seems more appropriate to view the plaintiffs' proposed method of scheduling as a device to avoid the anti-pyramiding provisions then to view the Service's actual scheduling as a scheme to avoid paying plaintiffs overtime under the Federal Employees Pay Act of 1945.

Plaintiffs cite the case of *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956) where this court stated, in reference to patrol inspectors of the Customs Border Patrol, as follows:

> * * * It may be that Congress would have been well advised to omit such employees from the Overtime Pay Act of 1945, or to make some different arrangement for their compensation. But Congress did not omit them, and their superiors were not authorized to deny to them the benefits of the act, on the ground that the administration of the act would be difficult, almost to the point of impossibility, or that money had not been provided to

pay the employees what they were entitled to under the law. [*Id.* at 367.]

Anderson, however, did not involve a claim for benefits under more than one overtime pay statute. The concern of the court there was that plaintiffs were compensated for overtime work. There is a vast difference between an agency acting to deprive its employees of pay benefits granted by a statute, and an agency exercising discretion conferred by statute in scheduling work so as not to maximize every conceivable pay benefit.

The practice of the agency in establishing a basic workweek of five days from Monday through Saturday and an administrative workweek from Sunday through Saturday is reasonable and in harmony with section 6101(a) and the implementing regulations thereunder. Where an agency's long-standing administration and interpretation of existing statutes and regulations is reasonable and not contrary to the language of those statutes it is entitled to great weight. *State of Alabama* v. *United States*, 198 Ct. Cl. 683, 461 F. 2d 1324 (1972); *Barrington Manor Apartments Corp.* v. *United States*, 198 Ct. Cl. 298, 459 F. 2d 499 (1972); *Malandra* v. *United States*, 195 Ct. Cl. 11 (1971); *DeLano* v. *United States*, 183 Ct. Cl. 379, 388, 393 F. 2d 517, 521 (1968). (Immigration and Naturalization Service practice under the Act of March 2, 1931.)

In order to add even more weight to its contention that the Service's practice of excluding Sunday from its basic workweek was reasonable, the defendant points to the fact that the Bureau of Customs has, since 1944, followed a similar practice of excluding Sunday from its basic workweek. This practice has the effect of denying customs inspectors overtime compensation under the Federal Employees Pay Act of 1945, by virtue of the anti-pyramiding provision, since they receive special compensation for Sunday work under the Act of February 13, 1911, 36 Stat. 901, *as amended*, Act of February 7, 1920, 41 Stat. 402, *as amended*, 19 U.S.C. § 267 (1970), the act on which the Act of March 2, 1931 was patterned. Plaintiffs counter by asserting that, since the Bureau of Customs begins its administrative workweek and its basic workweek on the same day, Monday, its exclusion of Sunday from the basic workweek, while proper, in no way

aids the defendant's position in the instant case. However, since the court has decided that the Service's practice of excluding Sunday from its basic workweek was proper in its own right, we do not deem it necessary to consider the practice followed by the Customs Bureau or to comment on the propriety thereof.

In conclusion, we hold that the Immigration and Naturalization Service properly exercised its discretion in excluding Sundays from the basic workweek. Furthermore, the Service's long-standing interpretation and application of the pertinent statutes and implementing regulations is reasonable and is therefore entitled to considerable weight. Plaintiffs have already received all extra compensation due them and are therefore not entitled to recover in this suit.

Accordingly, defendant's motion for summary judgment is granted, plaintiffs' cross motion for summary judgment is denied, and plaintiffs' petitions are dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1978

PETITIONER'S EXHIBIT 2

IMMIGRATION AND NATURALIZATION

SERVICE ADMINISTRATIVE MANUAL

Section 1c, Scheduling the Basic Workweek: Daily tours of duty in the basic workweek shall be established within a maximum of 9 continuous clock hours, with 1 hour for food and rest. Normally, each tour will consist of 8 hours of duty over a period of 8 hours and 30 minutes. The basic workweek for immigration officers performing inspection duties shall be established on weekdays, Monday through Saturday, including holidays occurring on those days, but excluding Sunday. When it is impracticable to prepare work schedules in advance for periods of not less than two weeks that coincide with pay periods, as provided in AM 2961, such work schedules for the basic workweek must be prepared and posted not later than the close of business on the Friday preceding the week for which the work schedules apply.

2818.07

Section 6a, Designation of the Eight Hours of Sunday Duty: The eight hours which are to be specified as the time on duty of eight hours or less on a Sunday need not necessarily be eight consecutive clock hours: Provided, that neither duties subject hereto nor other official duties may be performed during intervening hours. The eight hours are to be designated in such a manner as to provide the maximum coverage at the minimum cost. This section is not contradictory of Section 2a since official duties not subject hereto shall not be assigned between inspection duties will be assigned to an immigration officer on a Sunday.

For example, an immigration officer may be assigned to eight hours of Sunday duty from 8 a.m. to noon and from 4 p.m. to 8 p.m., or the eight hours of duty might be from 2 a.m. to 4 a.m., then from 7 a.m. to 9 a.m. and finally from 10 a.m. to 1 p.m.

Section 6b, Duties Subject Hereto and Basic Duty on the Same Sunday or Holiday: Where an immigration officer performs duties not subject to these procedures on a Sunday or on a holiday as a day of the basic workweek and he also performed duties which are subject hereto on that day, his payment for the day shall be the sum of his payment for basic hours, plus two days' extra payment for Sunday or holiday duty, plus overtime computed in accordance with Section 1 for duty, if any, which is in excess of eight hours.

For example: An immigration officer performs office duties not subject to these procedures on a Sunday as a day of his basic workweek from 8:30 a.m. to 5 p.m. If he should later be required to inspect for two hours subject hereto, he will be entitled to basic payment for the eight-hour tour plus two additional days' payment for the two hours of inspection duty.

PETITIONER'S EXHIBIT 3

ATTORNEY GENERAL'S GRANT OF DISCRETION

IMMIGRATION AND NATURALIZATION
SERVICE
SALARIES AND EXPENSES

1955

November 12, 1954

ALL DISTRICT DIRECTORS
IMMIGRATION AND NATURALIZATION SERVICE

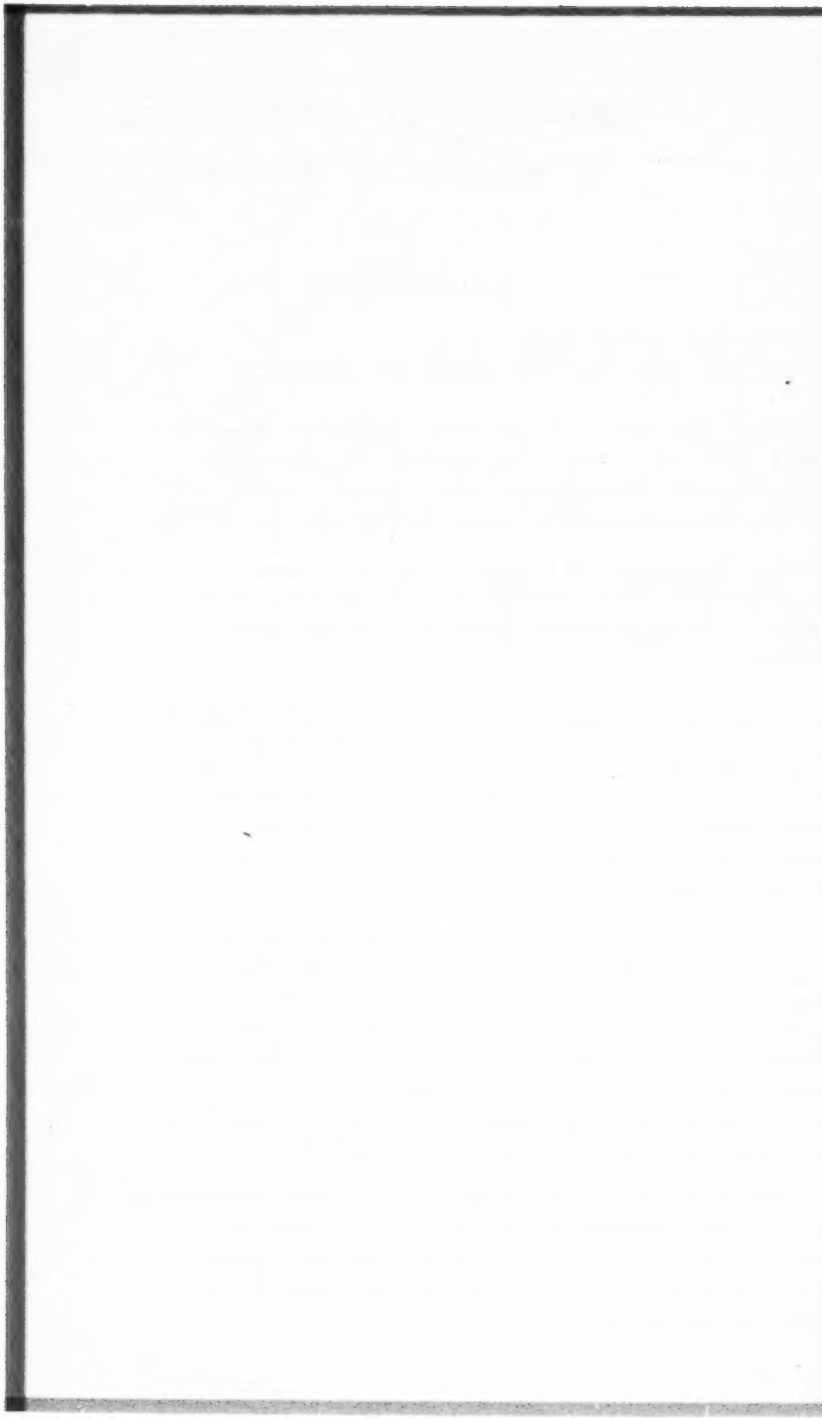
Reference 604(A) (2) of the Federal Employees Pay Act of 1945, as added by Section 210 of Fringe Benefits Bill which would ordinarily become effective November 7, 1954.

Attorney General has approved service recommendations for exception from new provisions. Recommendations approved were as follows:

"That the requirement for scheduling assignments to tours of duty in advance over periods of at least one week shall not be construed to prohibit such later changes in assignment as are required to meet situations otherwise beyond the control of this service.

That the basic forty-hour workweek need not be scheduled on five days when such a schedule would necessarily involve curtailing functions (or hiring additional personnel), or where situations to be met demand intensive and lengthy effort on certain days of the week, but would permit employees to be off duty on others.

That the two days outside the basic workweek need not be consecutive in the cases of inspectional, investigative, border patrol, detention and other enforcement and closely allied personnel.



That the working hours in each day need not be identical in cases where flexibility is essential to meet conditions over which we have no control or where application of the law would otherwise require hiring additional personnel or considerably increase costs.

That the basic non-overtime day may exceed eight hours in those cases where requiring an eight hour day would necessarily involve curtailing functions (or hiring additional personnel), or where situations to be met demand intensive and lengthy effort on certain days but would permit employees to be free on others.

That the requirement that the occurrence of holidays shall not affect the designation of the basic workweek shall not be construed to prohibit such adjustments in schedules as are necessary to meet increased workloads occasioned by those holidays. That there may be regularly scheduled breaks in duty of more than one hour in the cases of inspectional, investigative, border patrol, detention and other enforcement and closely allied personnel."

Nothing in the new Act or approval of recommendations changes mandatory requirements of 1945 Pay Act that non-overtime workweek of Fourty (40) hours is to be scheduled on not more than six (6) of any seven (7) consecutive days. While approval of recommendations allows service to schedule hours as before where necessary, the provisions added by the Fringe Benefits bill are to be complied with wherever feasible. They are not to be followed where this would prevent us from meeting conditions over which we have no control, where necessary flexibility would be lost, and/or where our present operations could be maintained only by hiring additional personnel.

?lease bedac receipt.

LOUGHRAN

E.A. LOUGHRAN

ASSISTANT COMMISSIONER

S: lmm; 4:11 p.m. 11/4/54

PETITIONER'S EXHIBIT 4

MEMORANDUM FROM MR. E. W. MYERS

Office of District Director

Received

Sept. 29, 1968

UNITED STATES GOVERNMENT

MEMORANDUM SW 73/40.20C

Date: September 28, 1966

To: District Director
El Paso, Texas El Paso, Texas

From: E. W. Myers, Assistant Regional Commissioner
Administrative Services, Southwest Region

Subject: Your ELP 71/4-C dated September 21, 1966: Scheduling Sunday overtime does not apply to Sunday overtime for employees engaged in inspection duties. Such scheduling is contrary to Service policy, (AM 2818.04).

The reason for this is to avoid the duplication of paying 1931 Act overtime (by operation of law) and 1945 Act overtime for a day which could be interpreted as being part of the basic work week (by reason of its being scheduled).

PETITIONER'S EXHIBIT 5

LETTER DATED MAY 19, 1970

FROM JOSEPH E. DUPUIS

SYS 71/25-C

L. C. Martindale, Associate
Deputy Regional Commissioner,
Management, Southwest Region

Joseph E. Dupuis, Officer in Charge
San Diego Border Station, San Ysidro,
California

Letter of Associate Deputy Regional Commissioner, Management, Southwest Region, of April 7, 1970, SW 73/40.13 and 73/40.14P, and copy of Comptroller General decision No. B-167804

The copy of the above cited Comptroller General decision referred to above has posed several problems in connection with the way immigration inspectors are scheduled to work at this port.

In the first place, and as a result of research because of that decision, I find the intermittent immigration inspectors have been regularly scheduled for Sunday duty in violation of your letter of May 9, 1967, SW 73/40.13-C. That letter makes no differentiation between intermittent and regular immigration inspectors. It states, "Please discontinue scheduling immigrant inspectors for Sunday duty on Form G-259". In line with that letter, and for other operational reasons, I have recently issued instructions that the intermittent immigration inspectors will not work on Sundays.

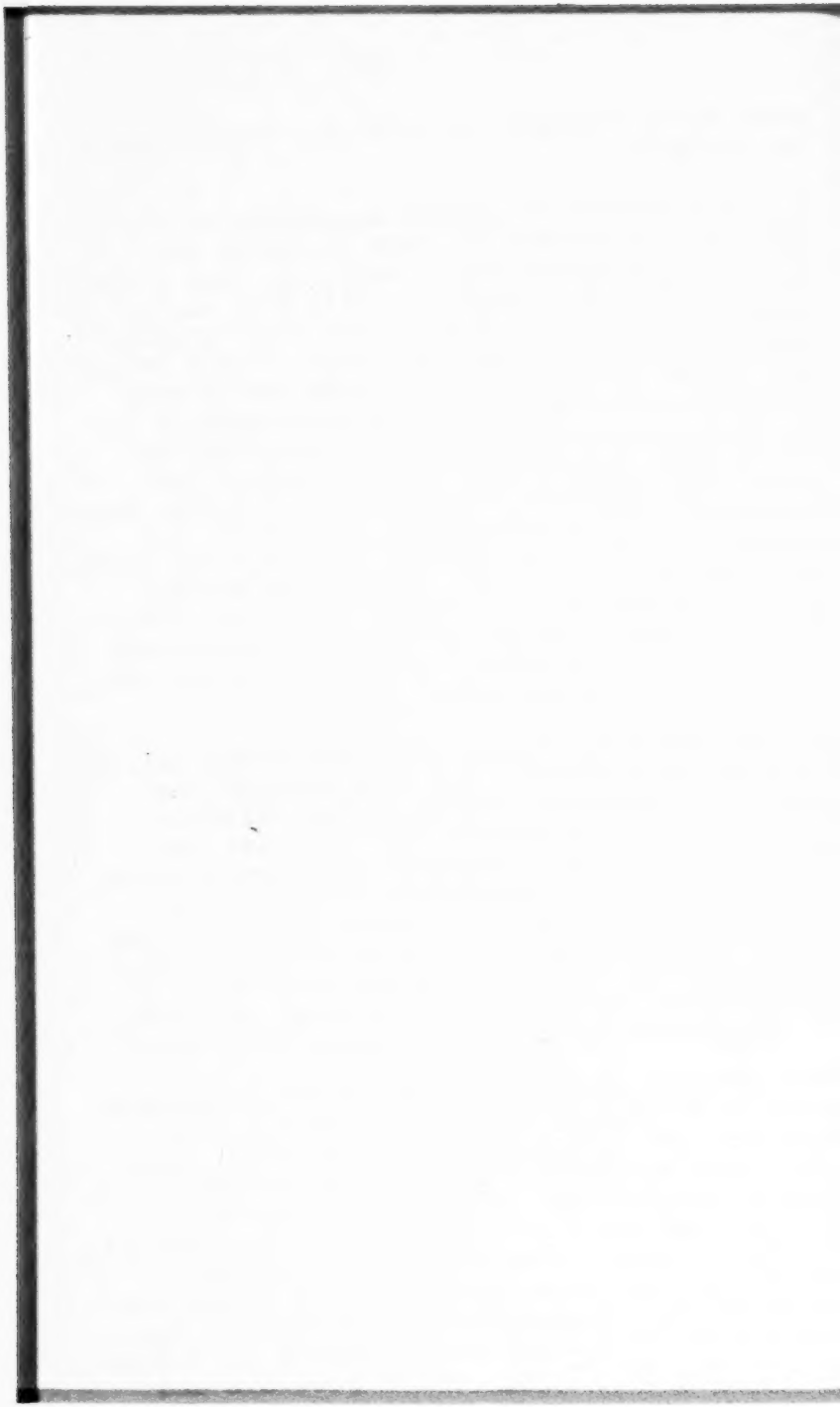
I further find that as a result of that letter, the then Officer in Charge had been forced to make two work assignment schedules for this port. One G-259 has been regularly sent to the Regional Office since that date showing no immigration inspectors assigned on Sundays. The file copy at this port is

then being changed to show all the officers so assigned.

It is a matter of common knowledge to everyone that this port is open to serve the public on a séven day a week, 24 hour a day basis. To admit that all officers can be scheduled off duty Sunday and then provide more coverage on that day than on any other day on an emergency short time basis without advance planning and prearrangement is to stipulate an unreasonable possibility. If it were tried, and prearrangement not made, any officer, and the entire force is involved, could apparently insist on not definitely stating whether he would be available until a few hours before the Sunday shift for which he is being asked to cover. This, in addition to causing an impossible operational situation, would apparently entitle him to "roll back" time.

All of the file copies of Forms G-259 on file at this office show all regular immigration inspectors assigned for definite hours of duty on Sunday for at least two weeks in advance. This, as indicated above, is because it is absolutely necessary to know in advance who will work and when they will work in order to be operationally prepared to meet commitments and the press of business as usual, or in the case of Sunday at this port, considerably more than usual.

This unusual arrangement has further brought about a situation where officers at this port are not assigned two consecutive days off. The agreement between the United States Immigration and Naturalization Service and the A.F.G.E., page 7, Article 11, "Tours of Duty:, item (2) states, "The administrative work week shall be seven consecutive days Sunday through Saturday. The basic work week shall be scheduled on 5 days, Monday through Friday, where possible and



the two days outside the basic work week shall be consecutive." Your letter of May 9, 1967, indicates the basic work week to be Monday through Saturday.

It is immediately apparent, of course, that at this port, since inspectors are not assigned on Sunday but all are actually working, the two consecutive days off are impossible.

It appears to me that a contention that all officers can be off duty on Sunday at any 24 hour a day, seven day a week office is not supportable, and perhaps some consideration should be given to having only one work schedule showing factual assignments with Sunday being included in the basic work week as operationally required.

I am bringing this matter to your attention because I desire assurance that this method of scheduling if it is to continue meets with Service approval, and secondly, so that I may properly answer inquiries from employees from a standpoint of management objectives.

CC; District Director
Los Angeles

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

TOM S. ACUNA, ET AL., Petitioner No. 259-80

ARTHUR C. ARCHIBALD, ET AL., Petitioner
No. 292-70

COURT P. ALLEN ET AL., Petitioner
No. 349-70

CECIL B. BARNETT, ET AL., Petitioner
No. 454-70

RODNEY S. CRAFT, ET AL., Petitioner
No. 203-72
v.
UNITED STATES, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PROOF OF SERVICE

State of California)
) SS
County of San Diego)

ROBERT C. BAXLEY after first being duly sworn, deposes and certifies that, on this 14th day of January, 1974, pursuant to Rule 33 he served the within Petition for Writ of Certiorari to the United States Court of Claims by mailing, postage prepaid, three copies of the Petition to the Attorney General

of the United States, Civil Division, Department of Justice, Washington, D. C., 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

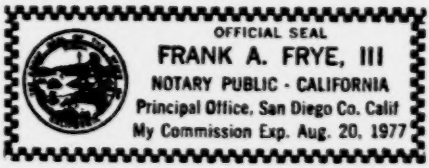
Robert C Baxley

ROBERT C. BAXLEY
1059 Tenth Avenue
San Diego, California
92112
Counsel for Petitioner

Subscribed and sworn to
before me this 14th day
of January, 1974.

Frank A Frye

Notary Public
in and for said County and State.


OFFICIAL SEAL
FRANK A. FRYE, III
NOTARY PUBLIC - CALIFORNIA
Principal Office, San Diego Co. Calif
My Commission Exp. Aug. 20, 1977

FILED
MAR 8 1974

No. 73-1112

In the Supreme Court of the United States

OCTOBER TERM, 1973

TOM S. ACUNA, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1112

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1. The issue presented is whether the Court of Claims erred in holding that 5 U.S.C. 6101(a)(3) gave the Immigration and Naturalization Service discretion to schedule the basic work week of immigration inspectors to fall between Monday and Saturday. Petitioners, immigration inspectors of the Immigration and Naturalization Service, U.S. Department of Justice, brought suit in the Court of Claims to recover compensation which they claim is due them for the time they work in excess of 40 hours a week. Petitioners are regularly scheduled to work six days a week. Their annual salary is based upon a normal 40 hour week, 8 hours a day, 5 days a week. In addition, immigration inspectors are regularly scheduled to work for 8 hours on Sundays. Thus, *in toto*, immigration inspectors work a 48 hour week; 8 hours a day, six days a week with one of those days always falling on Sunday.

Petitioners are paid their regular salary for the basic 40 hour week they work, and overtime for the 8 hours they are scheduled to work in excess of 40 hours. Current regulations[1] provide that the basic workweek falls between Monday and Saturday. The Act of March 2, 1931, as amended, 8 U.S.C. 1353a, establishes overtime, Sunday, and holiday pay specifically for immigration personnel at the rate of two days' pay for Sunday and holiday work. Consequently, petitioners, as presently paid, receive their basic salary for 40 hours' work performed between Monday and Saturday, and two days' pay for the extra eight hours worked on Sunday. This amounts to 7 days' pay for 6 days' work. For their extra work day petitioners receive no overtime pay under the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. 5542, because of the anti-pyramiding provision of that Act, 5 U.S.C. 5549, which precludes such overtime pay where employees receive overtime compensation under other statutory provisions.

Petitioners claim, however, that they should be receiving eight and one-half days' pay for six days' work. They contend that the agency abused its discretion in scheduling the basic workweek to begin on Monday, when the administrative workweek begins on Sunday. Petitioners claim that their basic workweek should begin on Sunday, entitling them to their basic salary for the first 40 hours worked (5 days' pay) plus two days' extra pay for Sunday, plus overtime for the final 8 hours worked (1½ days' pay), totalling 8½ days' pay for six days' work.

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[1]Immigration and Naturalization Service Administrative Manual 2818.04, section 1c, dated May 15, 1962.

2. The Court of Claims rejected petitioners' claims. It held that the agency had not abused its discretion in scheduling the basic workweek to begin on Monday, even though the administrative workweek of the agency begins on Sunday. The head of an Executive agency has discretion to consider both cost and the ability of the agency to function in scheduling the basic workweek, 5 U.S.C. 6101(a)(3), and the court found that in scheduling the basic workweek to exclude Sunday, consideration had been given to cost and the ability of the Service to function effectively. Moreover, according to the court, nothing in the applicable statutes or regulations requires that the start of the basic workweek coincide with the start of the administrative workweek. The court found that the agency's interpretation of the applicable statutes and regulations was reasonable and entitled to great weight.

3. The judgment of the Court of Claims is correct and no issue warranting further review is presented.

The Federal Employees Pay Act of 1945, as amended, 5 U.S.C. 6101(a)(3) provides:

> Except when the head of an Executive agency * * * determines that his organization would be severely handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that
>
> * * * * *
>
> (B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;
>
> * * * * *

This section clearly provides that the cost to the agency and the agency's ability to function may be considered in establishing the basic workweek. The court below expressly found that the departure from normal scheduling was based on these two considerations. Petitioners do not challenge the justification for the exception; rather, they dispute its application in this case.

Petitioners' argument reduces itself to the proposition that the Immigration and Naturalization Service has abused its discretion by failing to schedule the basic workweek so as to maximize the petitioners' compensation. The lack of merit in their argument is clearly demonstrated by 5 U.S.C. 5549, the anti-pyramiding provision of the Federal Employees Pay Act of 1945. Congress obviously intended, by enacting Section 5549, to preserve preferential overtime benefits previously established for designated classes of employees, such as immigration inspectors, while preventing them from collecting under two different statutes for the same services.

The Service's scheduling program properly implements the statutes and the intent of Congress to avoid double compensation for services rendered. When the agency's long-standing interpretation of the applicable statutes and regulations is reasonable and in harmony with the statutes, it is entitled to great deference. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367; *Udall* v. *Tallman*, 380 U.S. 1.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

DOJ-1974-03